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No. 85-16

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MERLE R. EDWARDS, JAMES BRIDGLAND, WILLIAM FISHER, EDWARD J. SCHRODE, JOHN T. TREDINNICK, and RICHARD L. ZATH,
Petitioners,

v.

WILKES-BARRE PUBLISHING CO. PENSION TRUST and WILKES-BARRE PUBLISHING CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Dated: September 3, 1985

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QUESTIONS PRESENTED

I. Whether Petitioners may properly raise in their Petition for Writ of Certiorari, an issue which is within the exclusive province of and has been decided by the National Labor Relations Board and which was not specifically raised in the courts below; and, if so, whether the actions of Respondents violated the National Labor Relations Act or federal labor law?

II. Whether the actions of Respondents in calculating Petitioners' pension benefits according to the terms of the Plan were reasonable?

III. Whether the actions of Respondents in calculating Petitioners' pension benefits according to the terms of the Plan were in compliance with the vesting provisions of the Employee Retirement Income Security Act?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Wilkes-Barre Publishing Company Pension Trust and Wilkes-Barre Publishing Company,* respectfully request that this Court deny the Petition for a Writ of Certiorari, seeking review of the decision of the United States Court of Appeals for the Third Circuit in this case.

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* The listing of Respondents' parent and affiliated companies as required by Sup. Ct. R. 28.1 is set forth on 1a-2a of the attached Appendix.

STATEMENT OF THE CASE

A. Factual Background

In 1945, the Wilkes-Barre Publishing Company ("the Company") established the Wilkes-Barre Publishing Company Pension Trust ("the Plan") to provide benefits for retiring employees. The Plan is a unilaterally administered, noncontributory plan which was created as a separate entity from the Company. The Plan is administered by a Retirement Committee appointed by the Board of Directors of the Company, and the Company is named as Plan Administrator. (Pet. App. 60a).[1]

The Plan provides that a participant shall have a fully vested right to a pension benefit after he or she has completed ten (10) years of credited service with the Company. (Pet. App. 56a). Participants who retire at their normal retirement date, defined as a participant's sixty-fifth (65th) birthday, are entitled to a normal retirement benefit. (Pet. App. 41a and 44a). The Plan also provides for early retirement and disability retirement benefits. (Pet. App. 44a-45a).

Under the terms of the Plan, the calculation of the amount of the basic normal retirement pension benefit is derived by using an average annual compensation component and a length of credited service component. (Pet. App. 46a). Participants also receive a three thousand dollar ($3,000.00) lump sum payment. (Pet. App. 46a). The compensation component is calculated by taking twenty-two percent (22%) of the participant's average annual compensation. Average annual compensation is computed by averaging the yearly compensation received by the participant during the five consecutive year period immediately prior to the earlier of (i) the participant's sixty-fifth (65th) birthday, or (ii) the date of the partic-

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[1] References to the Petition for Writ of Certiorari will be cited herein as (Pet. ——); references to Petitioners' Appendix will be cited herein as (Pet. App. ——).

ipant's termination of employment. (Pet. App. 38a). The service component is derived by multiplying the participant's total number of months of credited service by a fixed dollar amount. (Pet App. 46a).

Notwithstanding the foregoing formula, the Plan expressly provides for a minimum monthly normal retirement pension benefit of not less than one hundred dollars ($100.00). This minimum may be reduced pro-rata for participants with less than fifteen (15) years credited service. (Pet. App. 46a).

Early retirement benefits are available under the Plan to employees fifty-five (55) and older who have at least fifteen (15) years of credited service. (Pet. App. 44a). These benefits are calculated in the same manner as normal retirement benefits except that the benefit amount is reduced by one-half percent (½%) for each month prior to age sixty-five (65) that the participant begins receiving benefits. (Pet. App. 46a-47a). The Plan also provides disability retirement benefits to participants with fifteen (15) years of credited service. (Pet. App. 44a-45a). Disability retirement benefits are calculated in the same manner as normal retirement benefits. (Pet. App. 48a). Neither early nor disability retirement retirees are guaranteed the one hundred dollar ($100.00) minimum benefit, however.

Beginning on October 6, 1978, four separate labor organizations commenced an economic strike against the Company in connection with negotiations for new collective bargaining agreements. Each Petitioner was a member of one of these unions. Each voluntarily engaged in and supported this strike against the Company.

Several weeks after the commencement of the strike, the Company notified its striking employees that it intended to hire replacement employees and continue operating. Thereafter, the Company did hire new employees to replace those employees who chose to remain on strike.

These new employees began work under the established wages, benefits and conditions of employment at that time, including participation in the Plan. Since the commencement of the strike on October 6, 1978, however, every striking employee who offered to return to work with the Company has been returned to their former position or a substantially equivalent position under the established terms and conditions of employment.

At the time of the strike and thereafter, Petitioners were aware of the Plan and were familiar with its terms, having previously received copies of the Plan booklet and the Plan summaries. Petitioners had all previously engaged in strikes against the Company and were aware that they would not receive wages or other associated benefits while on strike. Despite this knowledge, Petitioners did not terminate their employment at the time they went on strike or anytime thereafter until they applied for retirement benefits. During the course of the strike after October 6, 1978, each Petitioner elected to retire from the Company and applied for benefits under the Plan.[2]

The retirement benefit amount for each Petitioner was calculated in accordance with the applicable language and formula set forth in the Plan. Consequently, the time that each Petitioner remained a striking employee after October 6, 1978, was included in the computation of the average annual compensation component and the length of service component of the benefit amount calculation. Since Petitioners were not earning regular income from the Company during the time they were on strike, the resultant figures based upon the five-year average compensation were necessarily less than they would have been had petitioners continued to perform services and earn compensation throughout the five-year period prior to retirement, or if Petitioners had terminated their em-

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[2] The retirement dates of each Petitioner and the type of retirement taken are set forth in footnote 1 of the district court's opinion. (Pet. App. 15a).

ployment with the Company rather than going and remaining on strike before retiring. Likewise, the resultant figures were less than they would have been if the strike had been settled and strikers afforded credit for strike time as part of the settlement as had been done in the past.

There had been three strikes at the Company prior to this 1978 strike. These strikes occurred in 1954, 1973 and 1974-75. In each of these strikes, the employees did not have their strike time included in the calculation of the average annual compensation component. It is uncontroverted, however, that in each instance the exclusion of strike time in calculating average annual compensation directly resulted from the collectively bargained settlement of the strike. (See district court's opinion, Pet. App. 22a, and Third Circuit's opinion, Pet. App. 5a).[3] The 1978 strike has not been settled. Therefore, no bargained agreement on the calculation of retirement benefits has resulted, and the Trustees have simply calculated retirement benefits in accordance with the Plan's plain and unequivocal language.

On July 15, 1980, over one year after most Petitioners began receiving pension benefits, the four striking unions filed unfair labor practice charges with the National Labor Relations Board ("NLRB") alleging that the Company was improperly calculating benefits for individuals who retired while on strike, thereby discriminating against these individuals. (Lodg. 1-4).[4] The charges further alleged that the Company refused to bargain over this issue. The NLRB investigated these allegations and dismissed the charges for lack of merit on August 28, 1980.

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[3] Petitioners' attempt to slant this fact in its Petition is inconsistent with the uncontroverted facts in the record as found by both the district court and the Third Circuit and should be summarily discounted. (Pet. App. 5a and 22a).

[4] Copies of these charges have been lodged with the Court and will be referred to as (Lodg. ——).

(App. 3a-5a).[5] The NLRB found, *inter alia*, that the Plan had been administered uniformly in accordance with its provisions, that the Trustees' interpretation of the Plan did not discriminate against striking employees and that the unions had not requested bargaining over the matter. The unions' appeals of these findings were denied by the NLRB Office of Appeals. (App. 6a-7a).

On September 30, 1980, further separate unfair labor practice charges were filed with the NLRB on behalf of each Petitioner. (Lodg. 5-10). These identical charges also alleged that the Company had improperly calculated the pension benefits of each retiree, thereby discriminating against each individual. The charges again alleged that the Company had refused to bargain over this issue. These charges were also investigated by the NLRB and dismissed for lack of merit. (App. 8a-19a). The NLRB found that the Plan had been administered uniformly, that the pension benefits had been calculated in accordance with the Plan's provisions, and that the challenged method of calculation had been common knowledge since well before the six-months limitations period set forth in Section 10(b) of the National Labor Relations Act ("NLRA"). Appeals from the dismissals of these charges also were denied. (App. 20a-21a).

B. Course of Proceedings

This action was commenced by Petitioners in the United States District Court for the Middle District of Pennsylvania on October 21, 1981. The Complaint alleged that the calculation of pension benefits in accordance with the terms of the Plan was arbitrary and capricious and violated the vesting, accrual and funding provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). The parties filed cross-motions for summary judgment. On January 18, 1984, the district court granted Respondents' motion for summary judgment against Petitioners. (Pet. App. 15a-25a). The district

[5] The Appendix is attached to this Brief in Opposition and will be referred to as (App. ——).

court held that the benefit calculations were reasonable and were in accordance with the vesting, accrual and funding standards of ERISA.

Petitioners appealed the decision to the United States Court of Appeals for the Third Circuit. On March 7, 1985, the Third Circuit entered an Opinion affirming the decision of the district court. (Pet. App. 1a-14a). The appeals court held the pension calculations to be reasonable and in accordance with the terms of the Plan. Moreover, the Third Circuit found the actions of Respondents to be in complete accord with the vesting, accrual and funding requirements of ERISA.[6] The Third Circuit denied Petitioners' request for rehearing en banc by Order dated April 9, 1985.

SUMMARY OF ARGUMENT

The decisions below that the Respondents' calculation of pension benefits in accordance with the terms of the Plan was neither arbitrary and capricious nor violative of the accrual, vesting and funding standards of ERISA conform to well-established principles of federal labor law and ERISA.

Petitioners are seeking in their Petition to raise an issue which is within the exclusive province of and was decided by the NLRB. Petitioners allege that the inclusion of strike time in the calculations of pension benefits violated the NLRA. This issue was precisely the issue presented to the NLRB on two occasions by Petitioners and their unions. It was twice rejected by that agency. Thus, Petitioners' attempt to again raise the issue in this Petition is improper. Moreover, even assuming this issue is properly raised, it is clear that Respondents' actions were lawful. Any reduction in Petitioners' monthly pension bene-

[6] Respondents' contention that Petitioners' claims are barred by the applicable statute of limitations was rejected by the Third Circuit. Further discussion of this issue, however, is not warranted at this juncture.

fit amounts was simply a direct economic consequence of their decision to strike consistent with federal labor law. This fact is underscored by the NLRB's holding on two occasions that Respondents' conduct was lawful under the NLRA.

Respondents' actions in including strike time in the computation of Petitioners' pension benefits were reasonable. Respondents calculated the benefit in strict accordance with the express terms of the Plan as was their duty under ERISA. Furthermore, the benefit calcalculations did not deviate from any alleged historical practice of excluding strike time when computing penison benefits. As the Third Circuit and the district court correctly held, the exclusion of strike time in prior strikes was a direct result of collectively bargained settlement agreements. The strike involved in this case has never been settled. Therefore, past computation methods are inapplicable in this case. Petitioners' were treated as striking employees pursuant to applicable federal labor law. Respondents computed Petitioners' benefits in compliance with the plain and unambiguous terms of the Plan. Thus, Respondents' conduct was not arbitrary or capricious, but was clearly reasonable.

Lastly, Petitioners' argument that Respondents' calculation of benefits deprived Petitioners of a vested benefit is misguided. As they have throughout this litigation, Petitioners misconstrue what vests under a pension plan. As this Court has plainly stated:

> The statutory definition of 'nonforfeitable assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the benefit.

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 512 (1981). Petitioners received the full benefits to which they were entitled under the Plan. Any reduction in the

dollar amount Petitioners subjectively "expected" to receive was the result of their conscious decision to go out and remain on strike. As the Third Circuit and the district court found, Respondents' calculations in accordance with the Plan's provisions in no way deprived Petitioners of any vested benefits under ERISA. The decisions below fully comport with federal labor policy and ERISA. This is an unremarkable case which does not merit review under this Court's established standards for granting a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. PETITIONERS IMPROPERLY RAISE AN ISSUE IN THEIR PETITION INVOLVING FEDERAL LABOR LAW WHICH IS WITHIN THE EXCLUSIVE PROVINCE OF AND WHICH HAS BEEN DECIDED BY THE NATIONAL LABOR RELATIONS BOARD; AND, EVEN IF PROPERLY RAISED, THIS ISSUE IS WITHOUT MERIT SINCE RESPONDENTS' CALCULATION OF PENSION BENEFITS DID NOT VIOLATE THE NLRA OR FEDERAL LABOR LAW.

Petitioners purport to justify their request for a writ of certiorari by characterizing the Third Circuit's opinion as leaving serious and recurring questions of federal labor law unanswered. A review of the record in this case leaves no doubt that the issue Petitioners now attempt to raise is within the exclusive province of and has already been decided by the NLRB. Thus, Petitioners' arguments are without merit and a grant of certiorari is inappropriate.

The four striking unions representing the Petitioners filed unfair labor practice charges in July, 1980, alleging essentially the issue raised in their Petition. Specifically, the charges alleged that Respondents' calculation of pension benefits violated the NLRA by causing Petitioners to receive a lower pension benefit than they would have received had they not gone on strike. (Lodg. 1-4). The NLRB thoroughly investigated these charges and dis-

missed them in their entirety as being without merit. (App. 3a-5a). The unions' appeals of these dismissals were denied. (App. 6a-7a).

In September, 1980, identical unfair labor practice charges were filed on behalf of each Petitioner. As in the previous charges, these charges also alleged that Respondents had improperly calculated pension benefits to penalize strikers for engaging in protected concerted activity. (Lodg. 5-10). Again, the charges were investigated by the NLRB and were dismissed as being without merit. (App. 8a-19a). Similarly, the appeals of these dismissals were denied. (App. 20a-21a).

Petitioners' attempt to revive this issue once more in their Petition for Writ of Certiorari is completely unjustified and should be disgeradded. The NLRB is the agency solely responsible for interpreting and administering the NLRA. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). The NLRB has specifically determined, not once but twice, that Respondents' actions were in full compliance with the NLRA. The NLRB's findings were clearly within the scope of its exclusive province, entrusted to it by Congress, to interpret and apply the NLRA. *Garner v. Teamsters*, 346 U.S. 485, 490 (1953). These NLRB findings decided and settled the issue Petitioners attempt to raise again here. Further review is neither necessary nor proper. *Nix v. Fulton Lodge No. 2, International Association of Machinists*, 452 F.2d 794 (5th Cir.), *cert. denied*, 406 U.S. 946 (1972) (issues fully and fairly decided by the NLRB cannot properly be relitigated in separate federal court lawsuit). *Accord, United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 420 (1966).

Petitioners' argument in this regard is not only substantively lacking, but procedurally improper as well. In effect, Petitioners are attempting to challenge the findings of the NLRB with respect to their earlier-filed unfair

labor practice charges. Petitioners are arguing in their Petition that the NLRB's findings were in error. It is well settled that Petitioners' present effort to seek review of the propriety of the NLRB's findings and conclusions is procedurally improper. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938) (United States district courts are without jurisdiction to entertain suits to review NLRB actions in unfair labor practice cases); *Pacific Southwest Airlines v. NLRB*, 611 F.2d 1309, 1311 (9th Cir. 1980) (refusal to issue a complaint on an unfair labor practice charge is unreviewable in federal court).[7]

Petitioners' argument is further flawed in that the question involving the alleged friction between the NLRA and ERISA, which Petitioners now assert as a basis for granting a writ of certiorari, has never been raised in this form until their Petition. This issue was not raised in Petitioners' Complaint. Indeed, the district court specifically found that:

> Although plaintiffs had alleged that the calculations used amounted to an unfair labor practice which penalized striking employees, this issue is not before us. (footnote omitted)

(Pet. App. 18a). The district court noted that charges concerning that issue had been filed with the NLRB, but were dismissed. (Pet. App. 18a, n.2).

Before the Third Circuit, Petitioners argued only that Respondents' actions were punitive and contrary to labor policy in support of their contention that such actions were arbitrary and capricious. The Third Circuit ex-

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[7] Even assuming that review of this issue was properly before the Court, the Court's review of the NLRB's twice-made determination that Respondents' actions did not violate the NLRA is extremely limited. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-501 (1978) (NLRB is vested with the primary responsibility of determining federal labor policy). The limited scope for review of such NLRB determinations as to federal labor policy should not serve as the basis for granting the Petition in this case.

pressly rejected this argument. In order to disguise a meritless claim under established federal law, Petitioners now attempt to formulate this new issue of the alleged friction between the NLRA and ERISA. This specific issue was not presented in this form to either of the lower courts. Hence, it is improper for Petitioners to raise the issue now as a basis for granting a writ of certiorari. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) (issue raised for first time in petition for writ of certiorari cannot be addressed). *Accord, United States v. Ortiz*, 422 U.S. 891, 898 (1975).

Even assuming this belatedly raised issue could be addressed, it is patently insufficient to support a grant of certiorari. Respondents' actions were consistent with the federal labor policy which was firmly in place when ERISA was enacted. National labor relations policy contemplates collective bargaining premised on the free play of economic forces. The NLRA envisions a type of economic warfare such that a party may extract concessions at the bargaining table through the application of economic leverage. *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 495 (1960). Thus, employees may engage in a concerted refusal to work, as in this case, to bring economic pressure to bear on their employer. Employees may not engage in this conduct and yet remain free from any resulting adverse economic consequences, however. *Murn v. United Mine Workers of America Pension Trust*, 718 F.2d 359, 361-362 (10th Cir. 1983) (refusal to credit strike time toward pension eligibility does not violate ERISA); *System Council T-4 v. NLRB*, 446 F.2d 815, 819 (7th Cir.), *cert. denied*, 404 U.S. 1059 (1972) (employer "need not compensate a striker with wages or deferred benefits for work not performed"). *Accord, Kimberly-Clark Corp.*, 171 NLRB 614 (1968); *General Electric Co.*, 80 NLRB 510 (1948).[8]

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[8] Petitioners' effort to distinguish these cases is unconvincing since it is based on the inaccurate premise that Respondents denied

Any reduction in Petitioners' monthly benefit amount was a direct economic consequence of their conscious decisions to go out and remain on strike until retirement, just as their loss of wages and Company-paid insurance benefits during the strike was an economic consequence of their actions. Petitioners took their actions with full knowledge of the Plan and its benefit calculation formula. Consequently, any reduction in the amount of the monthly benefit they may otherwise have received was a direct result of their knowing and willful actions. The adverse impact is simply an economic consequence of their decision to strike which is fully in accordance with federal labor policy. *System Council T-4 v. NLRB*, 446 F.2d at 818-819. (See also pp. 15-18, *infra*). This conclusion is underscored by the fact that the NLRB, which has primary duty to determine federal labor policy, analyzed Respondents' conduct on two separate occasions and found it fully in compliance with the NLRA. In light of the foregoing, Petitioners' unsupported claim that Respondents' actions amounted to an unfair labor practice is fallacious.

Petitioners' arguments are nothing more than an eleventh-hour theory concocted in an attempt to unnecessarily complicate a straightforward case. In reality, the NLRB and the courts below have applied well-settled principles under federal labor law and ERISA in upholding Respondents' calculation of pension benefits in accordance with the Plan's language. Such an unremarkable case does not represent the type of case for which a grant of certiorari is proper. *See* Sup. Ct. R. 17.

Petitioners an accrued benefit. The Third Circuit specifically held that Respondents' calculations complied with ERISA's accrual provisions and that Petitioners' contentions to the contrary were "groundless and [did] not merit discussion." (Pet. App. 13a). Petitioners have not challenged this finding by the Third Circuit. Thus, Petitioners' claim that these cases are inapposite rings hollow.

II. THE DECISIONS OF THE DISTRICT COURT AND THE THIRD CIRCUIT COMPORT WITH WELL-SETTLED PRINCIPLES DEFINING THE ARBITRARY AND CAPRICIOUS STANDARD UNDER ERISA.

Both the district court and the Third Circuit carefully analyzed Respondents' actions and expressly rejected the contention that they were arbitrary or capricious under ERISA. (Pet. App. 8a-11a and 22a). Both courts determined that the benefit calculations were reasonable and consistent with the terms of the Plan. In making this determination, the Third Circuit followed well-established principles under ERISA. Petitioners' suggestion that the Third Circuit's faithful adherence to prior decisions under ERISA served to expand the arbitrary and capricious standard is incorrect.

It is well settled that courts are restricted in their review of the actions of pension trustees or administrators. They are limited to determining only whether the trustees' or administrators' actions were arbitrary or capricious. *E.g., Rosen v. Hotel & Restaurant Employees*, 637 F.2d 592, 596 (3d Cir. 1981). Under this limited test, "it is not for the Court to substitute its judgment for that of the Trustees, nor is it the function of the Court to choose between several reasonable interpretations of a plan." *Snyder v. Titus*, 513 F.Supp. 926, 932 (E.D. Va. 1981) (citations omitted). *Accord, Govoni v. Bricklayers, Masons and Plasterers International Union*, 732 F.2d 250, 252 (1st Cir. 1984); *Miles v. New York State Teamsters Conference Pension and Retirement Fund*, 698 F.2d 593, 601 (2d Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 105 (1983); *Tomlin v. Board of Trustees*, 586 F.2d 148, 151 (9th Cir. 1978). Rather, the courts may only determine whether the trustees or administrators have acted in a rational and reasonable manner. *Bayles v. Central States, Southeast & Southwest Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir. 1979). Clearly, under

these established guidelines, the Third Circuit's determination that Respondents acted reasonably did not distort the arbitrary and capricious standard of ERISA.

In arguing that the Third Circuit's decision should be reviewed, Petitioners neglect to acknowledge the crucial fact that the Plan language, which Respondents were bound to follow, does not support Petitioners' position. There was no "gap in employment" or "separation" created by Petitioners being on strike. It is beyond dispute that Petitioners remained employees of the Company until the employment relationship was terminated by their retirement. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (striking employee remains an employee unless he obtains substantially equivalent employment or otherwise affirmatively terminates the employment relationship). Respondents' computation of pension benefits comported with the federal labor law requirement to treat strikers as employees. Indeed, treating strikers as having terminated employment, as Petitioners suggest, would have resulted in clear violations of Sections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C. §§ 158 (a)(1) and (a)(3). Furthermore, such conduct would likely constitute arbitrary and capricious conduct under ERISA. *Baeten v. Van Ess*, 474 F.Supp. 1324, 1329 (E.D. Wis. 1979) (treating striking employees as having terminated their employment for purposes of calculating pension benefits conflicts with federal labor policy and is arbitrary and capricious). The Third Circuit's finding that Respondents' actions were not arbitrary or capricious in no way distorts this standard. Rather, the decision complied with established tenants of federal labor law as well as those of ERISA.

Petitioners' argument is also deficient because it overlooks the fact that Respondents are charged with the responsibility of administering the Plan, not only for Petitioners, but for *all* participants under the Plan. *Palino v. Casey*, 664 F.2d 854, 858 (1st Cir. 1981). The rights of

participants who did not choose to go on strike, participants who initially went on strike but returned to work, and new participants who were hired as replacements for striking employees, must also receive due consideration. Respondents are under an obligation to avoid interpretations which favor one group of the Plan's participants at the potential expense of others. Adopting Petitioners' rationale would serve no purpose other than to render meaningless the express benefit calculation language of the Plan in order to favor Petitioners over other participants. Such a result is clearly impermissible under ERISA. *Miles v. New York State Teamsters Conference Pension and Rertirement Fund*, 698 F.2d at 599 (where trustees of a pension plan impose a standard not required by the plan's provisions, or interpret plan in a manner inconsistent with its plain words, or by their interpretation render some provisions of the plan superfluous, their actions may be arbitrary or capricious).

Ironically, if Respondents had interpreted the Plan as the Petitioners suggest, Respondents would have been forced into doing exactly what Petitioners argue is improper—involve the Trustees in the collective bargaining process. By interpreting the Plan to exclude strike time from the calculation of average annual compensation, the Trustees would, in effect, be unilaterally instituting a compromise of the Plan's provisions. In past strikes, such compromises had been reached at the bargaining table through negotiations for a strike settlement. In this case, the subject of pension benefit calculations was never raised in bargaining.[9] In the absence of a negotiated settlement, the Trustees simply interpreted the Plan in accordance with its plain and unambiguous language.

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[9] The unfair labor practice charges alleging a refusal to bargain on this issue were dismissed by the NLRB. The NLRB specifically found that the unions had not requested bargaining on this issue. (App. 4a).

As both the district court and the Third Circuit correctly noted, this strike presented different circumstances from the strikes in 1954, 1973 and 1974-75 in which strike time was excluded from benefit calculations. It is uncontroverted that the previous exclusions of strike time in calculating the pension benefits were the direct result of collectively bargained settlement agreements. Unlike the earlier strikes, however, the 1978 strike has never been settled. Thus, the calculations of pension benefits in this case were not a deviation from "historical practice" as Petitioners allege, but rather a perfectly reasonable interpretation of the Plan under circumstances markedly different from any of the previous strikes.

The foregoing considerations serve as a legitimate, reasonable basis for Respondents' calculations of benefits. The calculations were in complete accord with the terms of the Plan, which was approved by the Internal Revenue Service.[10] Moreover, Respondents' actions were consistent

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[10] Petitioners also make a cryptic reference to Respondents' alleged failure to comply with Section 1.411(a)-7(a)(5), Special Limitation, of the Internal Revenue Service regulations ("Section 1.411(a)-7(a)(5)"). This issue was first raised by Petitioners on appeal. Therefore, it is not properly before the Court and should be disregarded. *Hoover v. Ronwin*, —— U.S. ——, 104 S.Ct. 1989, 1998 n.25, *rehearing denied*, —— U.S. ——, 104 S.Ct. 3564 (1984) (issue not raised until proceedings before court of appeals improper for consideration in writ of certiorari); *Wetzel v. Liberty Mutual Insurance Co.*, 511 F.2d 199, 208 (3d Cir. 1975) (party failing to raise an issue until appeal waives his right to argue that issue).

Even assuming, *arguendo*, that this issue could be considered, it still does not provide a basis for granting the petition because it is meritless. The Third Circuit specifically considered and rejected Petitioners' argument regarding this regulation. Contrary to Petitioners' assertion, the thrust of this regulation is not to insure that individuals are given credit for non-compensated periods in amounts equal to what they had been earning previously for purposes of calculating average compensation during the final five year period. Rather, the regulation requires only that if the five year period includes periods of "less than a full year of participation" the compensation for such year must be adjusted or "annualized" to

with federal labor policy. It is meritless for Petitioners to suggest that Respondents' conduct was anything other than reasonable under well-settled principles for determining permissible conduct under ERISA.

III. IN FINDING RESPONDENTS' CALCULATION OF PETITIONERS' BENEFITS LAWFUL, THE DISTRICT COURT AND THE THIRD CIRCUIT CORRECTLY INTERPRETED AND APPLIED THE VESTING REQUIREMENTS SET FORTH IN ERISA AND ELUCIDATED IN *NACHMAN CORP. v. PENSION BENEFIT GUARANTY CORP.* AND *ALESSI v. RAYBESTOS-MANHATTAN, INC.*

Petitioners contend that the Third Circuit has expanded the holdings of *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) and *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), by holding Respondents' pension benefit calculations to be lawful. According to Petitioners, Respondents' calculation of benefits, resulting in a lesser amount than the Petitioners "expected" to receive, acted as a forfeiture. As the courts below recognized, this argument is misguided.

Throughout this litigation, Petitioners have continually misconstrued what actually vests under a pension plan according to ERISA. Vesting refers to a participant's "nonforfeitable" right to a pension benefit as provided under a pension plan. As was succinctly stated by this Court and followed by the Third Circuit in its decision in this case:

---

reflect the compensation which would have been paid for a full year of participation—*i.e.*, "average annual compensation." Application of this regulation to the instant circumstances would still produce zero compensation for Petitioners during the years following their decision to go on strike since both their periodic and annual rate of pay or compensation for these years was zero. Clearly, nothing in Section 1.1411(a)-7(a)(5) requires that a pension plan consider compensation prior to the relevant period defined in the plan documents. Thus, Petitioners' argument is specious.

> The statutory definition of 'nonforfeitable' assures that an employee's *claim* to the protected benefit is legally enforceable, but it does *not* guarantee a particular amount or a method for calculating the benefit. (emphasis supplied).

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. at 512. The Third Circuit correctly held that vesting did not entitle Petitioners to any particular benefit amount or method of calculation of that amount, but rather, only the right to receive a pension in accordance with the terms of the Plan. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. at 373.

Respondents complied with the vesting requirements of ERISA with a ten-year service requirement.[11] Petitioners received the full benefit to which they were entitled under the express terms of the Plan. ERISA's vesting provisions require nothing more. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 512. The mere consequence that Petitioners receive a lower amount than they subjectively "expected" to receive is irrelevant. ERISA protects only those benefits "guaranteed" by a plan's provisions, not the amount of benefits a participant subjectively "expects," or more accurately in Petitioners' case, "wishes" to receive. Essentially, Petitioners are contending that they expected to have their benefits calculated in a manner which would be patently inconsistent with the terms of the Plan. Such expectations were unreasonable and unjustified. Certainly, Respondents could not reasonably be expected to deviate from their duty under ERISA to follow the terms of the Plan in order to cater to the wishes of Petitioners.

---

[11] ERISA Section 203(a)(2), 29 U.S.C. § 1053(a)(2), provides for three alternative vesting schedules for qualified plans. Subparagraph (A) of this Section provides that a plan will qualify if an employee is fully vested in his accrued benefit after ten years of service. (Pet. App. 56a). Therefore, the Plan clearly comports with the vesting schedule requirement in Section 203(a)(2).

Any reduction in the benefits Petitioners "expected" to receive was caused solely by Petitioners' voluntary actions in going and remaining on strike. Petitioners were fully aware of the terms of the Plan and the manner in which benefits are calculated. They could have terminated their employment or returned to work at any time, but chose not to do so. Thus, the responsibility for any reduction from what they might have received under the Plan falls squarely upon Petitioners and their unions.

The Third Circuit's opinion did not expand the holdings of *Alessi* or *Nachman*. Rather, it is consistent with those cases and with ERISA. Contrary to the Petitioners' contentions, the Third Circuit's decision properly applied the principles set forth in the earlier decisions of this Court. In upholding Respondents' benefits calculations, the Third Circuit, in accordance with *Alessi*, held that "the method of calculation and the level of benefits are not vested rights but rather are governed by the terms of the Plan." (Pet. App. 13a). It is beyond dispute that Petitioners' benefit calculations were in accordance with the Plan's terms. Therefore, there was no forfeiture of vested benefits and no violation of the vesting standards under ERISA. Petitioners' efforts to create an issue in this regard should be rejected. In reaching its decision, the Third Circuit followed clearly established rules of law under ERISA as set forth by this Court in *Nachman* and *Alessi*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

R. EDDIE WAYLAND
(Counsel of Record)
D. MARK HILLIARD
KING, BALLOW & LITTLE
2400 First American Center
Nashville, Tennessee 37238
(615) 259-3456

RICHARD M. GOLDBERG
HOURIGAN, KLUGER, SPOHRER
& QUINN
700 United Penn Bank Building
Wilkes-Barre, PA 18701
(717) 825-9401
Counsel for Respondents

Dated: September 3, 1985

APPENDIX

APPENDIX

At the time the subject suit was filed, Respondent Wilkes-Barre Publishing Company was a Pennsylvania corporation and a wholly-owned subsidiary of Capital Cities Communications, Inc. of New York. Since that time, the operations of Wilkes-Barre Publishing Company have been merged into Capital Cities Media, Inc.

Capital Cities Media, Inc. is a wholly-owned subsidiary of Capital Cities Communications, Inc. The operating divisions of Capital Cities Media, Inc. include the Wilkes-Barre (Penn.) *Times-Leader*, Fairchild Publications, the Highland (Ill.) *Highland News Leader*, the Gilford (Conn.) Shore Line Newspapers, and the Belleville (Ill.) *News-Democrat*. Capital Cities Vision, Inc., the Red Bank (N.J.) *Red Bank Register*, and Toms River (N.J.) Toms River Publishing are wholly-owned subsidiaries of Capital Cities Media, Inc.

The following enterprises are operating divisions of Capital Cities Communications, Inc.: WPVI-TV, Philadelphia; WKBW-TV, Buffalo; WTNH-TV, New Haven; WTVD TV, Durham-Raleigh; KFSN-TV, Fresno; WPAT AM-FM, Paterson, N.J.; KLAC-AM and KZLA-FM, Los Angeles; WJR AM and WHYT-FM, Detroit; WKBW-AM, Buffalo; WPLO-AM and WKHX-FM, Atlanta; WPRO AM-FM, Providence; Sutton Industries, Mission Viejo, Cal.; *Albany Democrat-Herald*, Albany, Ore.; *Daily Tidings*, Ashland, Ore.; *Gresham Outlook*, Gresham, Ore.; *Springfield News*, Springfield, Ore.; *Cottage Grove Sentinel*, Cottage Grove, Ore.; *Lebanon Express*, Lebanon, Ore.; *Sandy Post*, Sandy, Ore.; *Stamp Collector* magazine; *Stamp Wholesaler* magazine; *Little Nickel*, Seattle, Wash.; and *Nickel Ads*, Portland, Ore.

The following companies are subsidiary corporations of Capital Cities Communications, Inc.; where a subsidiary is itself a parent corporation, the name of its subsidiaries are noted parenthetically: Oakland Press Co.,

Pontiac, Mich.; The Kansas City Star Company, Kansas City, Mo.; Capital Cities of Kansas, Inc. (parent of Pennypower Shopping News, Inc.); Capital Cities Properties, Inc.; Tampa Bay TV (WFTS-TV), Tampa, Fla.; Texas Media Holding Company, Inc. (parent of WBAP-KSCS, Inc., Fort Worth, Tex.; KTRK, Inc., Houston, Tex.; and Star Telegram, Inc., Forth Worth, Tex.); Institutional Investor, Inc., New York, NY; Securities Data Co., New York, NY; Wilson Publishing Co., Narragansett, RI; Capital Cities Cable of Albuquerque, Inc. (parent of Sandoval County Cable Television, Inc.); Capital Cities Cable of Ohio, Inc. (parent of Marks Cablevision of Green, Inc.); Capital Cities Cable of Indiana, Inc.; Coastal Bend Cablevision Corp.; Clear Cablevision, Inc.; Omnicom Cablevision of Illinois, Inc.; Omnicom of Michigan, Inc.; Capital Cities Pacific Cable, Inc.; Capital Cities Cable, Inc.; Capital Cities Cable of California, Inc.; Tele Hi-Fi Company, Inc. of Tulsa, Okl.; Capital Cities Entertainment Systems, Inc. of New York; Capital Cities Cable of Arizona, Inc.; and Omnicom Cablevision of Texas, Inc.

[SEAL]

NATIONAL LABOR RELATIONS BOARD
REGION 4
Suite 4400, William J. Green, Jr. Federal Building
600 Arch Street
Philadelphia, Pennsylvania 19106

Telephone (215) 597-7601

August 28, 1980

C. No. 778241 RRR

Warren J. Borish, Esquire
1200 Lewis Tower Building
Philadelphia, PA 19102

Re: Wilkes-Barre Publishing Company
Cases Nos. 4-CA-11231, 4-CA-11232, 4-CA-11233 and 4-CA-11234

Dear Mr. Borish:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, I find that the charges lack merit. The facts disclosed by the investigation did not establish that the Employer violated Section 8(a)(5) by refusing to bargain about its calculation of pension benefits for striking employees. First, under the provisions of the Pension Trust Indenture, the Retirement Committee, which administers the pension fund, has the authority to unilaterally modify the Pension Plan. Second, the Employer's calculation of pension benefits was made pursuant to a policy uniformly carried out for over a year. The Unions were aware of this fact since at least July 10, 1979. Section 10(b) of the Act precludes the

General Counsel from issuing a Complaint based upon conduct occurring more than six months prior to the filing and service of a charge. As the present method of pension calculations has been in effect since more than six months before July 15, 1980, further proceedings are time barred. Third, it appears that the Employer has not, in fact, changed its pension calculation methods, since the evidence did not establish that there has been a uniform practice of granting pension applicants credit for periods when they were on strike or otherwise not working. Although strike time was credited as worktime for pension calculation purposes after strikes in 1954 and 1974-75, this was only because the Union and the Employer entered into an explicit agreement to do so. Fourth, there was no evidence that a request for bargaining over this matter was ever made.

Furthermore, the investigation did not disclose any evidence that the Pension Plan has been applied in a discriminatory manner to strikers, in violation of Section 8(a)(3). The investigation established that the Plan had been administered uniformly in accordance with the provisions of the Plan. Accordingly, I am refusing to issue Complaint in these matters.

See attached form NLRB 4938 for procedure for filing an appeal in these matters.

Very truly yours,

/s/ Francis W. Hoeber
FRANCIS W. HOEBER
Acting Regional Director

Enclosures:

NLRB 4938
Notice of Appeal forms

cc: William Lubbers, General Counsel, NLRB, Washington, D.C. 20570

Wilkes-Barre Publishing Company, 15 N. Main St., Wilkes-Barre, PA 18711

Michael Zinser, Esquire, King & Ballow, 1st American Center, 24th Fl., Nashville, TN 37238

Wilkes-Barre Typographical Union, Local 187, c/o Wilkes-Barre Council of Newspaper Unions, River and Market Sts., Wilkes-Barre, PA 18701

Newspaper Guild of Wilkes-Barre, Local 120, c/o Wilkes-Barre Council of Newspaper Unions, River and Market Sts., Wilkes-Barre, PA 18701

Wilkes-Barre Printing Pressmen, Local 137, c/o Wilkes-Barre Council of Newspaper Unions, River and Market Sts., Wilkes-Barre, PA 18701

Wilkes-Barre Stereotypers and Electrotypers Union, Local 139, c/o Wilkes-Barre Council of Newspaper Unions, River and Market Sts., Wilkes-Barre, PA 18701

FWH:pmw

[SEAL]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

November 17, 1980

Re: Wilkes-Barre Publishing Co.
Case Nos. 4-CA-11231
4-CA-11232
4-CA-11233
4-CA-11234

Warren J. Borish, Esq.
Meranze, Katz, Spear & Wilderman
12th Floor, Lewis Tower Bldg.
NE. Corner 15th & Locust Street
Philadelphia, Pennsylvania 19102

Dear Mr. Borish:

Your appeal from the Acting Regional Director's refusal to issue a complaint in the above-captioned cases has been carefully considered.

The appeal is denied for the reasons set forth in the Acting Regional Director's letter dated August 28, 1980. In view of the Union's clear knowledge outside the Section 10(b) period of the Employer's method of calculating pension benefits, the Employer's subsequent conduct within the Section 10(b) period in adhering to this practice was not deemed to constitute "reaffirmation" within the meaning of the Board's decisions so as to toll the running of the Section 10(b) period. Accordingly, further proceedings were deemed unwarranted.

Very truly yours,

William A. Lubbers
General Counsel

By /s/ Mary M. Shanklin
MARY M. SHANKLIN
Acting Director
Office of Appeals

cc: Director, Region 4

Wilkes-Barre Publishing Co., 15 North Main Street, Wilkes-Barre, Pennsylvania 18711

Michael Zinser, Esq., King & Ballow, 1st American Center, 24th Floor, Nashville, Tennessee 37238

Wilkes-Barre Typographical Union, Local 187, c/o Wilkes-Barre Council of Newspaper Unions, River & Market Streets, Wilkes-Barre, Pennsylvania 18701

Newspaper Guild of Wilkes-Barre, Local 120, c/o Wilkes-Barre Council of Newspaper Unions, River & Market Streets, Wilkes-Barre, Pennsylvania 18701

Wilkes-Barre Printing Pressmen, Local 137, c/o Wilkes-Barre Council of Newspaper Unions, River & Market Streets, Wilkes-Barre, Pennsylvania 18701

Wilkes-Barre Stereotypers & Electrotypers Union, Local 139 c/o Wilkes-Barre Council of Newspaper Union, River & Market Streets, Wilkes-Barre, Pennsylvania 18701

[SEAL]

NATIONAL LABOR RELATIONS BOARD
REGION 4
Suite 4400, William J. Green, Jr. Federal Building
600 Arch Street
Philadelphia, Pennsylvania 19106

Telephone (215) 597-7601
November 24, 1980
C.778413, RRR

Warren J. Borish, Esquire
Meranze, Katz, Spear & Wilderman
1200 Lewis Tower Bldg.
Philadelphia, Pa. 19102

Re: Wilkes-Barre Publishing Co.
Case No. 4-CA-11458-1

Dear Mr. Borish:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, I find that the charge lacks merit. The evidence failed to establish that employee James Bridgland, who retired effective February 1, 1979, has been unlawfully discriminated against with respect to the calculation of his pension benefits. The investigation disclosed that the Pension Plan has been administered uniformly and that pension benefits have been calculated in accordance with the Plan's established provisions since well before the 10(b) period, and that the Union had knowledge prior to the 10(b) period of the method utilized by the Employer to calculate employees' pension benefits. Accordingly, I am refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,

/s/ Peter W. Hirsch
PETER W. HIRSCH
Regional Director

Enclosures:

NLRB 4938 and Notice of Appeal forms

cc:

William Lubbers, General Counsel, NLRB,
Washington, D.C. 20570

Wilkes-Barre Publishing Co., 15 N. Main St.,
Wilkes-Barre, Pa. 18711

Michael Zinser, Esquire, King & Ballow,
1st American Ctr., Nashville, TE 37238

James Bridgland, 12 Division St., Pittston, Pa. 18640

PWH:hw

[SEAL]

NATIONAL LABOR RELATIONS BOARD
REGION 4
Suite 4400, William J. Green, Jr. Federal Building
600 Arch Street
Philadelphia, Pennsylvania 19106

Telephone (215) 597-7601
November 24, 1980
C.778414, RRR

Warren J. Borish, Esquire
Meranze, Katz, Spear & Wilderman
1200 Lewis Tower Bldg.
Philadelphia, Pa. 19102

Re: Wilkes-Barre Publishing Co.
Case No. 4-CA-11458-2

Dear Mr. Borish:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, I find that the charge lacks merit. The evidence failed to establish that employee Merle Edwards, who retired effective February 1, 1979, has been unlawfully discriminated against with respect to the calculation of his pension benefits. The investigation disclosed that the Pension Plan has been administered uniformly and that pension benefits have been calculated in accordance with the Plan's established provisions since well before the 10(b) period, and that the Union had knowledge prior to the 10(b) period of the method utilized by the Employer to calculate employees' pension benefits. Accordingly, I am refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,

/s/ Peter W. Hirsch
PETER W. HIRSCH
Regional Director

Enclosures:

NLRB 4938 and Notice of Appeal forms

cc:

William Lubbers, General Counsel, NLRB,
Washington, D.C. 20570

Wilkes-Barre Publishing Co., 15 N. Main St.,
Wilkes-Barre, Pa. 18711

Michael Zinser, Esquire, King & Ballow,
1st American Ctr., Nashville, TE 37238

Merle Edwards, 65 Shoemaker St., Forty Fort, Pa. 18704

PWH:hw

[SEAL]

NATIONAL LABOR RELATIONS BOARD
REGION 4
Suite 4400, William J. Green, Jr. Federal Building
600 Arch Street
Philadelphia, Pennsylvania 19106

Telephone (215) 597-7601
November 24, 1980
C.778415, RRR

Warren J. Borish, Esquire
Meranze, Katz, Spear & Wilderman
1200 Lewis Tower Bldg.
Philadelphia, Pa. 19102

Re: Wilkes-Barre Publishing Co.
Case No. 4-CA-11458-3

Dear Mr. Borish:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, I find that the charge lacks merit. The evidence failed to establish that employee William Fischer, who retired effective May 31, 1979, has been unlawfully discriminated against with respect to the calculation of his pension benefits. The investigation disclosed that the Pension Plan has been administered uniformly and that pension benefits have been calculated in accordance with the Plan's established provisions since well before the 10(b) period, and that the Union had knowledge prior to the 10(b) period of the method utilized by the Employer to calculate employees' pension benefits. Accordingly, I am refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,

/s/ Peter W. Hirsch
PETER W. HIRSCH
Regional Director

Enclosures:

NLRB 4938 and Notice of Appeal forms

cc:

William Lubbers, General Counsel, NLRB,
Washington, D.C. 20570

Wilkes-Barre Publishing Co., 15 N. Main St.,
Wilkes-Barre, Pa. 18711

Michael Zinser, Esquire, King & Ballow,
1st American Ctr., Nashville, TE 37238

William Fischer, 217 Howard St., Larksville, Pa. 18704

PWH:hw

[SEAL]

NATIONAL LABOR RELATIONS BOARD
REGION 4
Suite 4400, William J. Green, Jr. Federal Building
600 Arch Street
Philadelphia, Pennsylvania 19106

Telephone (215) 597-7601
November 24, 1980
C.778411, RRR

Warren J. Borish, Esquire
Meranze, Katz, Spear & Wilderman
1200 Lewis Tower Bldg.
Philadelphia, Pa. 19102

Re: Wilkes-Barre Publishing Co.
Case No. 4-CA-11458-4

Dear Mr. Borish:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, I find that the charge lacks merit. The evidence failed to establish that employee Edward Schrode, who retired effective August 1, 1980, has been unlawfully discriminated against with respect to the calculation of his pension benefits. The investigation disclosed that the Pension Plan has been administered uniformly and that pension benefits have been calculated in accordance with the Plan's established provisions since well before the 10(b) period, and that the Union had knowledge prior to the 10(b) period of the method utilized by the Employer to calculate employees' pension benefits. Accordingly, I am refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,

/s/ Peter W. Hirsch
PETER W. HIRSCH
Regional Director

Enclosures:

NLRB 4938 and Notice of Appeal forms

cc:

William Lubbers, General Counsel, NLRB,
Washington, D.C. 20570

Wilkes-Barre Publishing Co., 15 N. Main St.,
Wilkes-Barre, Pa. 18711

Michael Zinser, Esquire, King & Ballow,
1st American Ctr., Nashville, TE 37238

Edward Schrode, 3 Brown St., Wilkes-Barre, Pa. 18702

PWH:hw

[SEAL]

NATIONAL LABOR RELATIONS BOARD
REGION 4
Suite 4400, William J. Green, Jr. Federal Building
600 Arch Street
Philadelphia, Pennsylvania 19106

Telephone (215) 597-7601
November 24, 1980
C.778416, RRR

Warren J. Borish, Esquire
Meranze, Katz, Spear & Wilderman
1200 Lewis Tower Bldg.
Philadelphia, Pa. 19102

Re: Wilkes-Barre Publishing Co.
Case No. 4-CA-11458-5

Dear Mr. Borish:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, I find that the charge lacks merit. The evidence failed to establish that employee John Tredinnick, who retired effective March 26, 1979, has been unlawfully discriminated against with respect to the calculation of his pension benefits. The investigation disclosed that the Pension Plan has been administered uniformly and that pension benefits have been calculated in accordance with the Plan's established provisions since well before the 10(b) period, and that the Union had knowledge prior to the 10(b) period of the method utilized by the Employer to calculate employees' pension benefits. Accordingly, I am refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,

/s/ Peter W. Hirsch
PETER W. HIRSCH
Regional Director

Enclosures:

NLRB 4938 and Notice of Appeal forms

cc:

William Lubbers, General Counsel, NLRB,
Washington, D.C. 20570

Wilkes-Barre Publishing Co., 15 N. Main St.,
Wilkes-Barre, Pa. 18711

Michael Zinser, Esquire, King & Ballow,
1st American Ctr., Nashville, TE 37238

John Tredinnick, 302 Blackman St.,
Wilkes-Barre, Pa. 18702

PWH:hw

[SEAL]

NATIONAL LABOR RELATIONS BOARD
REGION 4
Suite 4400, William J. Green, Jr. Federal Building
600 Arch Street
Philadelphia, Pennsylvania 19106

Telephone (215) 597-7601
November 24, 1980
C.778412, RRR

Warren J. Borish, Esquire
Meranze, Katz, Spear & Wilderman
1200 Lewis Tower Bldg.
Philadelphia, Pa. 19102

Re: Wilkes-Barre Publishing Co.
Case No. 4-CA-11458-6

Dear Mr. Borish:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, I find that the charge lacks merit. The evidence failed to establish that employee Richard L. Zath, who retired effective February 6, 1980, has been unlawfully discriminated against with respect to the calculation of his pension benefits. The investigation disclosed that the Pension Plan has been administered uniformly and that pension benefits have been calculated in accordance with the Plan's established provisions since well before the 10(b) period, and that the Union had knowledge prior to the 10(b) period of the method utilized by the Employer to calculate employees' pension benefits. Accordingly, I am refusing to issue Complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,

/s/ Peter W. Hirsch
PETER W. HIRSCH
Regional Director

Enclosures:

NLRB 4938 and Notice of Appeal forms

cc:

William Lubbers, General Counsel, NLRB,
Washington, D.C. 20570

Wilkes-Barre Publishing Co., 15 N. Main St.,
Wilkes-Barre, Pa. 18711

Michael Zinser, Esquire, King & Ballow,
1st American Ctr., Nashville, TE 37238

Richard L. Zath, 230 Old River Road,
Wilkes-Barre, Pa. 18792

PWH:hw

[SEAL]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

January 27, 1981

Re: Wilkes-Barre Publishing Co.
Case No. 4-CA-11458 1-6

Warren J. Borish, Esq.
Meranze, Katz, Spear & Wilderman
12th Floor Lewis Tower Bldg.
NE Corner 15th & Locust Street
Philadelphia, Pennsylvania 19102

Dear Mr. Borish:

Your appeals from the Regional Director's refusal to issue complaints in the above matters have been duly considered.

The appeals are denied. Insufficient bases existed for a finding that the Employer had changed its method of calculating pensions unlawfully. Moreover, the Union, as exclusive bargaining representative of the employees, was fully aware of the changes in the plan which occurred more than a year prior to the filing of the charge and did not request bargaining over the effect of the strike on pensions. In any event, since former employees, Bridgland, Edwards, Fischer and Tredinnick had started to receive their retirement checks in 1979, outside the 10(b) period, their charges are barred by the time limitation of the Act. Moreover, since there was no basis for a finding that the Employer had discriminatorily changed the calculation of the benefits paid for former employees Schrode and Zath, both of whom had retired within six months preceding the filing of the charge, but rather has calculated the pensions of all individuals who have retired since

the implementation of the new plan consistent with the terms of the plan, further proceedings herein were deemed unwarranted.

Very truly yours

WILLIAM A. LUBBERS
General Counsel

By /s/ Mary M. Shanklin
MARY M. SHANKLIN
Acting Director
Office of Appeals

cc: Director, Region 4

Wilkes-Barre Publishing Co., 15 North Main Street, Wilkes-Barre, Pennsylvania 18711

Michael Zinser, Esq., King & Ballow, 1st American Center, Nashville, Tennessee 37238

Mr. James Bridgeland, 12 Division Street, Pittston, Pennsylvania 18640

Mr. Merle Edwards, 65 Shoemaker Street, Forty Fort, Pennsylvania 18704

Mr. William Fischer, 217 Howard Street, Larksville, Pennsylvania 18704

Mr. Edward Schrode, 3 Brown Street, Wilkes-Barre, Pennsylvania 18702

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